U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 8088192

Date: MAR. 13, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior software developer under the second-preference immigrant classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition and dismissed the Petitioner's following motion to reconsider. The Director concluded that the Petitioner did not demonstrate the Beneficiary's possession of the minimum employment experience required for the offered position or the requested visa classification.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

## I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position. *Id.* Labor certification also indicates that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to USCIS. *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. START OF POST-BACCALAUREATE EXPERIENCE

Advanced degree professionals must have "advanced degrees or their equivalent." Section 203(b)(2)(A) of the Act. The term "advanced degree" means

> any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

8 C.F.R. § 204.5(k)(2).

A petitioner must also demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the accompanying labor certification states the minimum requirements of the offered position of senior software developer as a U.S. master's degree or a foreign equivalent degree in computer science, computer engineering, electrical engineering, or a related analytical field, and two years of software engineering experience with a particular developer platform. Consistent with the definition of "advanced degree," the labor certification also states the Petitioner's acceptance of an alternate combination of education and experience: a U.S. bachelor's degree or a foreign equivalent degree and five years of experience. In addition, part H.14 of the certification, "Specific skills or other requirements," lists additional technical experience required for the job.

On the labor certification, the Beneficiary attested that, in 2008, before the petition's priority date, an Indian university awarded him a bachelor's degree in computer engineering. He also stated that he thereafter gained more than five years of full-time, qualifying experience by the priority date.[2]

A petitioner for an advanced degree professional must submit "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree," and "letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience." 8 C.F.R. § 204.5(k)(3)(i)(B). As proof of the

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[1] This petition's priority date is November 18, 2014, the date DOL accepted the accompanying labor certification application for filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The record shows that the Beneficiary began working for the Petitioner in December 2013, before the petition's prior date. A labor certification employer, however, cannot rely on experience that a foreign national gained with it, unless the experience occurred in a position substantially different than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3). The Petitioner here does not contend that the Beneficiary gained qualifying experience with it. We will therefore disregard the experience the Beneficiary gained with the Petitioner before the petition's priority date.

Beneficiary's educational qualifications, the Petitioner submitted copies of his Indian bachelor of engineering diploma, a "certificate of passing" from the university that issued the degree, a letter from the university-affiliated institute where he studied, and an independent, professional evaluation equating his foreign educational credentials to a U.S. bachelor of science degree in computer engineering. As proof of the Beneficiary's qualifying experience, the Petitioner submitted letters from his former employers and affidavits from former coworkers.

As the Director noted, the evidence does not demonstrate the Beneficiary's acquisition of at least five years of experience from the issuance of his degree diploma on February 18, 2009, until the petition's priority date of November 18, 2014. The Director therefore concluded that the Petitioner did not establish the Beneficiary's qualifying experience for the offered position or the requested classification.

The Petitioner argues that the Beneficiary completed all requirements for his bachelor's degree in June 2008, about eight months before the university issued his diploma. The Petitioner notes that the diploma states the Beneficiary's passage of the degree's examination in "2008" and that the university issued the certificate of passing on June 24, 2008. The Petitioner therefore contends that the Beneficiary's post-baccalaureate period begins in June 2008, and that, from then until the petition's priority date of November 18, 2014, he gained the requisite five years of qualifying experience.

On April 17, 2017, USCIS adopted our decision in a similar case as binding on all Agency employees. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017). *O-A-* held that a beneficiary has a degree as of a school's issuance of a pre-diploma, "provisional certificate" if the beneficiary completed all substantive degree requirements and the university or college approved the degree. Unlike in *O-A-*, the Petitioner here did not submit a document entitled "provisional certificate." As it is not clear the Director's findings are consistent with *O-A-*, we will withdraw the Director's decision and remand the matter.

On remand, the Director should issue a Request for Evidence and ask the Petitioner whether the Beneficiary received a provisional certificate, pursuant to *O-A-*, and, if so, to provide a copy of it to determine whether the Petitioner can establish the Beneficiary has the required education to meet the terms of the labor certification.

## III. THE REQUIRED EXPERIENCE

Even if the Beneficiary began to gain post-baccalaureate experience in July 2008 as the Petitioner contends, the record does not sufficiently document his possession of at least five years of experience as required for the offered position and the requested visa classification. On the labor certification, the Beneficiary attested to about 62 months of qualifying experience, as follows:

- About 23 months as a programmer for a U.S. provider of software and information technology (IT) services, from December 2011 through November 2013;
- About 16 months as a team lead for an Indian IT service provider, from July 2010 to November 2011;

- About 20 months as a software developer for another Indian IT service provider, from November 2008 to June 2010; and
- About three months as a junior software engineer for a third Indian IT service provider, from July 2008 to October 2008.

To support qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the employers' names, titles, and addresses, and describe a beneficiary's experiences. *Id.* If such letters are unavailable, USCIS may consider other evidence of a beneficiary's experience. *Id.*

Here, the Petitioner submitted two letters from the Indian company that purportedly employed the Beneficiary from July 2010 to November 2011. Contrary to 8 C.F.R. § 204.5(g)(1), neither letter describes the Beneficiary's experience at the company. The Petitioner also submitted an affidavit from a purported former company coworker of the Beneficiary. But the Petitioner has not demonstrated the unavailability of a company letter describing the Beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). The record also lacks documentary evidence corroborating the coworker's claimed employment by the company. In addition, the company letters indicate the Beneficiary's hiring as a "Software Engineer" and his promotion in July 2011 to the position of "Team Leader." Both the coworker's affidavit and the labor certification state the Beneficiary's service to the company as only a team leader. The record does not describe the Beneficiary's job duties as a software engineer with the company. A petitioner must resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the Beneficiary's first year of employment with the company did not involve software engineering experience with the requisite developer platform, the Beneficiary would fall short of the required five years of qualifying experience.

The Petitioner also submitted a letter from the Indian company that purportedly employed the Beneficiary from November 2008 to June 2010. Like the letters from the former employer discussed above, however, this company letter also does not describe the Beneficiary's experience. The Petitioner submitted an affidavit from a purported former company coworker of the Beneficiary. But the record does not establish the unavailability of a company letter describing the Beneficiary's experience and lacks corroborating evidence of the coworker's claimed employment at the company. Thus, the record does not establish the Beneficiary's claimed 20 months of qualifying experience with this employer.

For the foregoing reasons, the Petitioner has not demonstrated the Beneficiary's possession of at least five years of experience as required for the offered position and the requested visa classification. The Director did not notify the Petitioner of these evidentiary deficiencies. Thus, on remand, the Director should inform the Petitioner of the defects and afford it a reasonable opportunity to respond.

## IV. ABILITY TO PAY THE PROFFERED WAGE

The record also does not establish the Petitioner's ability to pay the proffered wage of the offered position. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R.

§ 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.* If petitioners have at least 100 employees, like the Petitioner here, however, USCIS may also accept a statement from a financial officer demonstrating the business's ability to pay a proffered wage. *Id.*

The labor certification states the proffered wage of the offered position of senior software developer as $108,000 to $113,000 a year. As previously noted, the petition's priority date is November 18, 2014.

The Petitioner submitted a January 2016 statement from its executive vice president, deputy general counsel, indicating the company's employment of more than 100 people and asserting its ability to pay the position's proffered wage. The statement, however, lacks financial information about the Petitioner and does not indicate the company's total number of employees. Accordingly, the letter is insufficient to demonstrate the Petitioner's ability to pay.[3] The Petitioner submitted a copy of its annual report for 2014. But the record lacks required evidence of its ability to pay in later years.

The Director did not previously notify the Petitioner of these evidentiary deficiencies. Thus, on remand, the Director should inform the Petitioner of the defects, request any other evidence the Director deems appropriate, and provide the Petitioner a reasonable opportunity to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

## V. CONCLUSION

We remand to allow consideration of our adopted decision detailing evidence required to demonstrate a beneficiary's pre-diploma completion of a bachelor's degree. Also, the Petitioner did not demonstrate its ability to pay the proffered wage or the Beneficiary's possession of the minimum experience required for the job offered and the requested visa classification.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.

[3] Also, USCIS records indicate the Petitioner's filing of several Form I-140 petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). A petitioner must demonstrate its ability to pay the combined proffered wages of a given petition and any others that were pending or approved as of its priority date, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). A petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or that USCIS rejected, denied, or revoked. A petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of their respective petitions, or after their respective beneficiaries obtained lawful permanent residence.